

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE:  
BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL NO. 2406)**

**Master File No. 2:13-CV-20000-RDP**

**This Document Relates to  
Provider Track Cases**

**PROVIDER PLAINTIFFS' SUBMISSION ON REMAND**

The finish line is in sight for Your Honor's work as a transferee judge in this case. As set forth below, it is now possible to map out the end of the MDL phase of this litigation. After the last pending motions are decided, the parties can begin preparing for trial in Alabama and litigating claims in other states as well.

The Providers submitted a version of this proposal to the Blues on June 7 and received no response. A copy of that email communication is attached as Exhibit A. The first information Providers receive about Defendants' position on remand will be when they receive Defendants' submission later today.

**Status of Cases Transferred Via Section 1407**

Most of the Provider actions before this Court were originally filed in this district, and the Court has personal jurisdiction over all the defendants in those cases. Doc. No. 925. In addition, two groups of cases were transferred to this Court by the JPML and remain pending here. The first group contains eight actions that are substantially identical to the *Conway* action filed in this Court. These actions were filed in other districts when this Court's personal jurisdiction over non-Alabama defendants was an open question; filing those cases and transferring them was a "belt and suspenders" measure to ensure that this Court's orders would apply to those defendants. This Court later held, however, that it had personal jurisdiction over non-Alabama defendants, and

venue in this district was appropriate. Doc. No. 925. The second group of cases contains six actions originally filed in Texas and Louisiana.<sup>1</sup>

### **Status of Pending Motions**

Several pending motions address issues common to all Providers and Defendants. These are:

- Providers' motion for class certification
- Providers' motion for summary judgment on the standard of review for their group boycott claims
- Providers' motion for summary judgment on the Blues' single-entity defense
- Providers' motion for summary judgment on the Blues' common-law trademark rights
- Defendants' motion for summary judgment on the standard of review
- Defendants' motion for summary judgment that Providers' damages are time-barred and speculative
- Defendants' motion for summary judgment on claims by non-general acute care hospitals and claims based on Blue system rules other than ESAs and BlueCard
- *Daubert* motions related to the motions above

The Providers and the Defendants have agreed that the Court should prioritize the motion for class certification and both motions for summary judgment on the standard of review. The

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<sup>1</sup> The actions are:

- *Chiropractic Plus, P.C. v. Blue Cross Blue Shield of Tex.*, No. 13-cv-234 (S.D. Tex.)
- *Hosp. Serv. Dist. 1 of the Parish of East Baton Rouge, La. v. Blue Cross & Blue Shield of Ala.*, No. 15-cv-523 (M.D. La.)
- *Quality Dialysis One, L.L.C v. Quality Dialysis Two, L.P.*, No. 15-cv-3491 (S.D. Tex.)
- *Richmond SA Servs., Inc. v. Blue Cross & Blue Shield of Ala.*, No. 16-cv-1140 (S.D. Tex.)
- *Am. Surgical Assistants, Inc. v. Blue Cross & Blue Shield of Ala.*, No. 16-cv-1146 (S.D. Tex.)
- *Houston Home Dialysis v. Blue Cross & Blue Shield of Ala.*, No. 19-cv-3791 (S.D. Tex.)

Providers believe that the remaining motions could be decided shortly after.

### **Recommendation for Remand Procedure**

The Providers propose a four-step process for handling the remaining issues in this case and preparing for remand or transfer of cases other than the prioritized proceeding.

First, the Court should set a schedule for the remainder of the litigation in the prioritized proceeding, including a trial date. With motions for summary judgment and class certification fully briefed, only a limited number of steps remain before trial.

Second, the Court should rule on all the pending motions, which would resolve the final issues common to all cases in the MDL and allow the parties to narrow their focus for trial.

Third, the Court should remand the six cases originally filed in Texas and Louisiana.

Fourth, the Court should set a deadline for the Providers to amend their complaint, or file new complaints that relate back to the consolidated complaint, to include plaintiffs and allegations specific to each jurisdiction other than Alabama in which they seek relief. Then the Court can transfer cases to those jurisdictions. The deadline to amend the complaint or file new complaints could be set after the trial in the prioritized proceeding.

### **Common Benefit Order**

Counsel for the Providers have invested millions of dollars and tens of thousands of hours developing the facts and legal theories in this case. Once cases begin to be remanded, other attorneys may attempt to piggyback on that work by filing their own suits against the Blues in other jurisdictions. This Court should enter an order establishing a common benefit fund into which a percentage of any recoveries in those cases must be paid, before the remaining cases are remanded and this MDL court completes its work. Entry of a common benefit percentage order is common in complex class and mass litigation and specifically contemplated by the Manual for

Complex Litigation. “If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs’ lawyers to pay a certain percentage of the fees they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well.” Manual for Complex Litigation, Fourth § 22.927 (2004) (citing, *inter alia*, *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL no. 926 (N.D. Ala)). The Providers will work to make a proposal to the Court for such an order and discuss the matter with the Special Master.

### **Conclusion**

The issues that justified transfer to this Court under Section 1407 are ripe for resolution. Now is the time to map out what happens next. The Providers are prepared to discuss these issues with the Court at its convenience.

Dated: June 16, 2022

Respectfully submitted,

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